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No. 89-1112

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,
Petitioner,
v.
ELEANOR T. JOHNSON and FRANKLIN D. JOHNSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In ruling on this case, the United States Court of Appeals for the District of Columbia Circuit correctly decided issues of District of Columbia local tort law, but decided no issues relating to Washington Metropolitan Area Transit Authority's Sovereign Immunity. Should this Court review the District of Columbia Circuit's decision?

2. In ruling on this case, the United States Court of Appeals for the District of Columbia Circuit correctly decided issues of District of Columbia local tort law, but decided no issue relating to the adequacy of Washington Metropolitan Area Transit Authority's drug testing rules and regulations. Should this Court review the District of Columbia Circuit's decision?

3. In ruling on this case, the United States Court of Appeals for the District of Columbia Circuit applied the proper and well-settled standard of review for reviewing grants of summary judgment. Should this Court review the District of Columbia Circuit's decision?

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

This case comprises several commonlaw tort claims arising out of the March 20, 1986, death of Devora H. Johnson, the daughter of respondents Eleanor T. Johnson and Franklin D. Johnson. Though vitally important to the parties, this case involves no important unsettled legal issues. This case does not conflict with any other reported decision. Moreover, the facts of this case are so unusual that this case is unlikely to arise again.

As in most tort cases, this case turns upon the jury's interpretation of the evidence. Accordingly, the Court should deny the petition for certiorari.

STATEMENT OF THE CASE

A. Introduction

This case arises out of Devora H. Johnson's death. Ms. Johnson suffered a horrible death; she was struck and killed by a Washington Metropolitan Area Transit Authority ("WMATA") subway train while she lay on the tracks in WMATA's Metro Center train station, located in Washington, D.C.

WMATA's own post-incident testing procedures later determined that its train operator, Keister N. Dixon, had ingested cocaine and marijuana prior to the time of the accident. According to WMATA's own Substance Abuse Policy, Mr. Dixon was presumed impaired as a result of his ingestion of cocaine. The evidence, viewed most favorably to the plaintiffs, supports the conclusion that Mr. Dixon had a duty to, but failed to, stop the WMATA train prior to its striking Ms. Johnson. The Johnsons' expert, Professor David Schorr, stated that though the evidence is in dispute, there is evidence from which the conclusion may be drawn that a reasonably prudent train operator should have been able to stop his or her train prior to its striking Devora Johnson.

B. Course of Proceedings

Eleanor T. and Franklin D. Johnson filed suit against WMATA in the Superior Court of the District of Columbia, generally alleging that WMATA, through its employees, was legally responsible for the death of their daughter, Devora H. Johnson.[1] On November 14, 1986, WMATA successfully removed the Johnsons' suit to the United States District Court for the District of Colum-

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[1] Eleanor T. Johnson filed suit as personal representative of the Estate of Devora H. Johnson and on her own behalf as Mother and Next-of-Kin to Devora H. Johnson. Franklin D. Johnson filed suit on his own behalf as Father and Next-of-Kin to Devora H. Johnson.

bia where it was assigned to the Honorable Louis F. Oberdorfer.

On January 27, 1988, Judge Oberdorfer granted WMATA's Motion for Summary Judgment. On February 5, 1988, Judge Oberdorfer filed a Memorandum Opinion. Although the Court recognized the presence of factual disputes, it characterized the evidence supporting the Johnsons' theory of the case as "inherently incredible."

Thereupon, Mr. and Mrs. Johnson timely noticed their appeal to the United States Court of Appeals for the District of Columbia Circuit. On August 22, 1989, the Court of Appeals, citing material inconsistencies in the deposition testimony of impartial witnesses, reversed the District Court's judgment and remanded for further proceedings. Following the Court of Appeals' denial of WMATA's Motion for Rehearing and Motion for Rehearing *En Banc*, WMATA filed its Petition for Certiorari.

C. The Evidence

1. *Introduction*

At the time of her death on March 20, 1986, Devora Johnson was the 29-year-old mother of three-year-old Erik Smith. Ms. Johnson, along with her son, lived with her mother, respondent Eleanor T. Johnson.

2. *The Events of March 20, 1986*

At approximately 8:30 p.m. on the day of her death, Devora Johnson was waiting for a subway train in the WMATA train station called Metro Center. As a train approached the station, Devora Johnson, standing near the edge of the platform, was talking to a WMATA employee. Instead of ensuring that Devora Johnson was out of danger, the employee turned away from Ms. Johnson.

Although Devora Johnson was too close to the edge of the platform, the train, in violation of WMATA's procedures, failed to slow down and failed to sound its horn. Unfortunately, in the next few moments, Ms. Johnson came to be on the tracks.

There is deposition testimony that Ms. Johnson jumped down to the tracks. In any event, Devora landed on her feet. Then she lay down, stretching her body perpendicular to the tracks. She then clasped her hands together in an upward prayerful motion, before placing her head upon her hands.

On the most critical factual issue in this case, that is, whether Mr. Dixon had time in which to stop his train prior to striking and killing Devora Johnson, there is a wide divergence of testimony. Some of the eyewitnesses stated in depositions that Devora Johnson was struck in mid-air by Mr. Dixon's train. Other impartial eyewitnesses have related a much different version of the tragic events giving rise to this action. Both Richard L. Moore and Ronald Thompson testified that Devora Johnson lay on the tracks for at least five seconds, and perhaps as many as fifteen seconds, before Mr. Dixon's train struck and killed her.

The testimony of those witnesses who testified in deposition that Devora Johnson was hit in mid-air by Mr. Dixon's train is severely undercut by WMATA's own expert witness, Carol L. McMahon, M.D. Dr. McMahon, a Deputy Medical Examiner with the Office of the Chief Medical Examiner of the District of Columbia, is a forensic pathologist. Based on her background and training, and on her review of Devora Johnson's autopsy file, Dr. McMahon testified that Devora Johnson's injuries were consistent with a finding that Devora Johnson lay on the tracks, between the trails, when WMATA's train struck and killed her. Moreover, Dr. McMahon stated that Devora Johnson's injuries were not consistent with a

finding that Devora Johnson was struck while she was in mid-air.

3. *Keister Dixon*

As he operated his train, Dixon was singing and whistling. Following the accident which claimed Devora Johnson's death, Keister Dixon was escorted to the Washington Hospital Center for mandatory testing for the presence af alcohol and certain illicit drugs. Keister Dixon's "post-incident medical examination" (*i.e.*, "drug test") was mandatory pursuant to WMATA's "Post-Incident Medical Examination" policy. Keister Dixon's drug test was determined to be positive for cocaine under the criteria contained in WMATA's Substance Abuse Policy. The drug test also established the presence of a marijuana metabolite, Delta-9-THC Carboxy Acid.

WMATA's Substance Abuse Policy contains the following statement: "The Substance Abuse Policy defines minimum levels of substances which, when detected, *presume impairment*" (emphasis supplied). The minimum level of cocaine which, when detected, presumes impairment under WMATA's Substance Abuse Policy is a "[d]etectable level in urine or blood as confirmed by [an] acceptable confirmation test." Accordingly, under WMATA's own rules, Keister Dixon was presumed impaired by cocaine at the time his train killed Devora Johnson.

WMATA's rules and regulations forbid train operators from using marijuana or cocaine. This Rule States: "Employees must not possess or be under the influence of intoxicants while on duty." As a safety-sensitive employee, a train operator such as Keister Dixon is one "whose daily work places him in a position where either an employee himself or a patron may be impacted by an unsafe act."

D. The Decision of the Court of Appeals

Citing the deposition testimony of Messrs. Moore and Thompson, the Court of Appeals found that there remains in this case a genuine issue as to whether the collision could have been avoided. The Court noted that this is an issue appropriately resolved by a jury.

The Court also addressed WMATA's claim that the District Court's grant of summary judgment could be upheld on other grounds. First, the Court addressed the issue of the "last clear chance doctrine." The Court found that for the doctrine to apply, District of Columbia law did not require WMATA to have been negligent before it discovered or should have discovered Ms. Johnson's presence on the train tracks. Accordingly, the Court of Appeals found it unnecessary to consider whether there was any evidence in the record supporting a finding of prior negligence on WMATA's part. The Court concluded that under District of Columbia law, such evidence was not necessary to withstand summary judgment.

Next, the Court examined whether there was any evidence to support a claim that WMATA breached its applicable standard of care. The Court did not decide this issue. Instead, the Court remanded this issue to the District Court to determine whether Mr. Dixon's drug tests would be admissible at trial.

Finally, the Court ruled that although no cases from the District of Columbia involved this issue, the District of Columbia courts recognize the last clear chance doctrine in suicide cases.[2]

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[2] The Court also invited the District Court to reconsider its ruling denying the Johnsons access to contemporaneous witness statements gathered by WMATA personnel pursuant to normal WMATA procedures immediately after Ms. Johnson's death.

REASONS FOR DENYING THE WRIT

I. THIS CASE RAISES ISSUES OF DISTRICT OF COLUMBIA LOCAL TORT LAW, BUT NO ISSUES RELATING TO WMATA'S SOVEREIGN IMMUNITY

To bolster its chances of obtaining a writ of certiorari, WMATA has attempted to invent a sovereign immunity issue in this case. No such issue exists. WMATA simply disagrees with the Court of Appeals' interpretation of local tort law.

Noting this Court's special role in interpreting interstate compacts, such as the WMATA Compact,[3] WMATA asserts that the Court of Appeals has impermissibly expanded WMATA's tort liability in violation of its sovereign immunity. Section 80 of the WMATA Compact provides, in pertinent part, that WMATA is liable for the torts of its employees in the conduct of any proprietary function. Section 80 specifically states that WMATA's tort liability shall be governed by the law of the applicable local jurisdiction. As the District of Columbia's tort law evolves, WMATA's potential tort liability changes. No sovereign immunity issues, however, are raised by any such changes.

Moreover, in this case, the Court of Appeals properly followed District of Columbia law. *See Byrd* v. *Hawkins*, 404 A.2d 941 (D.C. 1979). WMATA is unable to specify what portion of the Court of Appeals' opinion is contrary to *Byrd*. In any event, this Court is hardly the appropriate forum to decide disputes regarding local tort law.

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[3] WMATA Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966), *codified at* D.C. Code Ann. § 1-2431.

II. THIS CASE RAISES ISSUES OF DISTRICT OF COLUMBIA LOCAL TORT LAW, BUT NO ISSUES RELATING TO THE ADEQUACY OF WMATA'S DRUG TESTING RULES AND REGULATIONS

The Court of Appeals did not decide any issue relating to the adequacy of WMATA's drug testing rules and regulations. Moreover, the Court of Appeals did not base any part of its decision on any alleged inadequacies of WMATA's drug testing rules and regulations. WMATA's rules and regulations relating to drug testing were approved in *Sanders* v. *WMATA*, 819 F.2d 1151 (D.C. Cir. 1987). Respondents have not challenged this decision.

III. THIS CASE RAISES NO ISSUES RELATING TO THE PROPER SCOPE OF REVIEW UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

WMATA, unhappy with the Court of Appeals' thorough review of the record asserts that the appellate court failed to apply the proper standard of review. Contrary to WMATA's representations, the Court of Appeals properly applied the standard of review enunciated in *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986).

The District Court had disregarded as inherently incredible the testimony of Messrs. Thompson and Moore that Ms. Johnson lay on the tracks for as long as fifteen seconds before the WMATA train collided with her. The District Court observed that these same witnesses had also testified that the distance between Ms. Johnson and the train was ten to twenty feet when she jumped onto the tracks.

As the Court of Appeals recognized, the testimony of Messrs. Thompson and Moore regarding the time Ms. Johnson lay on the tracks is incompatible with their own

testimony regarding the distance between Ms. Johnson and the train at the time she came to be on the tracks. This incompatibility does not mean that there are no genuine issues of material fact for the jury to decide. WMATA's assertions are nothing more than factual arguments appropriate as a closing argument to persuade a jury to credit its version of the facts.

WMATA ignores the evidence that demonstrated that Ms. Johnson moved around on the tracks and that she lay upon the tracks for as long as fifteen seconds. The Court of Appeals properly reviewed this evidence and found it sufficient to submit the matter to a jury.

The District of Columbia Circuit's decision is in the mainstream of settled law regarding the proper standard of review to be accorded grants of summary judgment.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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